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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)
)
GTE CORPORATION,)
Transferor,)
)
and)
)
BELL ATLANTIC CORPORATION,)
Transferee.)
)
For Consent to Transfer of Control)

CC Docket No. 98-184

RCN TELECOM SERVICES, INC.

PETITION FOR EVIDENTIARY HEARING

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RCN TELECOM SERVICES, INC.

PETITION FOR EVIDENTIARY HEARING

I. Introduction

RCN Telecom Services, Inc. ("RCN" or "Petitioner"), through undersigned counsel, and pursuant to Section 309 of the Communications Act of 1934, as amended, ("the Act") respectfully requests that the Commission hold an evidentiary hearing to decide whether the proposed application ("Merger Application") of GTE Corporation ("GTE") for authority to merge into Bell Atlantic Corporation ("Bell Atlantic") satisfies the "public interest, convenience, and necessity" by determining whether Bell Atlantic has properly complied with its obligations under Sections 251 and 252 of the Act.^{1/}

^{1/} 47 U.S.C. §§ 251, 252, 309 (1997). RCN is concurrently filing with the Commission a separate "Motion for Leave to File Petition for Evidentiary Hearing" in this proceeding.

II. Under Section 309 of the Act, the Commission Should Hold An Evidentiary Hearing On Disputed Factual Matters Related to Bell Atlantic's Compliance with Sections 251 and 252 of the Act

A. History

RCN currently operates in Bell Atlantic territory in Massachusetts, New Jersey, New York and Pennsylvania.^{2/} Therefore, the proposed merger of Bell Atlantic and GTE directly impacts RCN, and RCN is a party in interest with respect to the Merger Application.

RCN's decision to file comments and reply comments in this proceeding in opposition to the proposed merger of Bell Atlantic and GTE was based on RCN's experiences with Bell Atlantic's continuing and flagrant failures to meet its obligations under Sections 251 and 252 of the Act.^{3/} As detailed in its initial and reply comments, RCN, in seeking to interconnect with Bell Atlantic, has been the victim of numerous anti-competitive practices. RCN will not here repeat all of the specific examples cited in its comments, but instead confines itself to representative instances involving New York City and Boston, Massachusetts. Attached as Appendix A is the Statement of Joseph Kahl detailing these allegations.

While Bell Atlantic's Reply Comments and attached "Responses to Specific Allegations" asserted that it is fully compliant with Sections 251 and 252 of the Act, RCN and other commenters have alleged facts which, if true, demonstrate just the opposite. In fact, Bell Atlantic's "Responses to Specific Allegations" are little more than self-serving platitudes that provide only Bell Atlantic's

^{2/} RCN's indirect subsidiary Starpower Communications, LLC ("Starpower") operates in Washington, D.C. and Maryland.

^{3/} See Comments of RCN Telecom Services, Inc., CC Docket No. 98-184 (filed Nov. 23, 1998) ("RCN Comments") and Reply Comments of RCN Telecom Services, Inc. CC Docket No. 98-184 (filed Dec. 23, 1998) ("RCN Reply Comments").

own assessment of its compliance with the Act. For the most part, Bell Atlantic has not provided facts on the basis of which the Commission can draw its own reasoned conclusions. Therefore, the FCC should conduct an evidentiary hearing to determine whether Bell Atlantic has complied with or, on the contrary, seeks to defeat the purpose and intent of Sections 251 and 252 of the Act.

B. The Legal Basis for an Evidentiary Hearing

1. There are Specific Allegations of Fact Sufficient to Show that Grant of the Merger Application Would Be *Prima Facie* Inconsistent with the Public Interest, Convenience, and Necessity

Under Section 309(e) of the Act, if, "in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented *or* the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for a hearing on the ground or reasons then obtaining. . ."^{4/} Therefore, if a party wishes the Commission to hold an evidentiary hearing to address a question of fact, the party must satisfy the following two-prong test as stated in *Astroline*: (1) the party must submit a petition "containing allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]"; and (2) "having found that the petitioner has alleged a *prima facie* inconsistency with the public interest, the Commission determines whether, 'on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented.'"^{5/}

^{4/} 47 U.S.C. § 309(e) (1997) (emphasis added); *see also U.S. v. FCC*, 652 F.2d 72, 88-89 (D.C. Cir. 1980).

^{5/} *Astroline Communications Company v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir 1988).

In this case, a grant of the Merger Application would not serve the "public interest, convenience or necessity" unless the merger applicants can establish that they have met their respective obligations under Sections 251 and 252 of the Act.^{6/} RCN alleges, and provides detailed factual representative occurrences, that Bell Atlantic's actions and policies are anticompetitive, discriminatory, designed to protect market position, and inconsistent with the "public interest, convenience, and necessity" and thus violate Sections 251 and 252 of the Act.

Under the *Astroline* test, the Commission must first determine whether Bell Atlantic's non-compliance with Sections 251 and 252 of the Act, as detailed in RCN's and other commenters' initial and reply comments, and as summarized in the affidavit attached hereto, is contrary to the "public interest, convenience and necessity." As stated in the Commission's Memorandum Opinion and Order approving the NYNEX and Bell Atlantic merger, the public interest analysis which the Commission is required to undertake "necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard, *inter alia*, to a review of local market conditions."^{7/} Thus, the public interest analysis would require the Commission to include an analysis of local competition, including Bell Atlantic's compliance with Sections 251 and 252 of the Act.

^{6/} Section 251(b)(4) states that each local exchange carrier has the "duty to afford access to the poles, ducts, conduits and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224." 47 U.S.C. § 251(b)(4) (1997).

^{7/} *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997).

If RCN's allegations against Bell Atlantic are true – which the Commission must assume for the purposes of the *Astroline* analysis^{8/} – then the next question is whether Bell Atlantic's well documented actions and policies are contrary to the "public interest, convenience, and necessity." If Bell Atlantic's practices violate Sections 251 and 252 of the Act, they would clearly be inconsistent with the "public interest, convenience and necessity."

2. There are Substantial and Material Questions of Fact Regarding Bell Atlantic's Compliance with Sections 251 and 252 of the Act

Next, in order to determine whether an evidentiary hearing is necessary, the Commission must determine whether RCN has presented "a substantial and material question of fact."^{9/} RCN has previously submitted evidence in its initial comments and reply comments in this proceeding detailing the discriminatory behavior of Bell Atlantic, and provides further evidence in the attached Affidavit of Joseph Kahl. At the Commission's *en banc* hearing, a Bell Atlantic representative stated that the company is not engaged in a pattern of noncompliance with Section 251 of the Act.^{10/}

Therefore, a factual dispute arises as to whether Bell Atlantic is continuing to implement policies and positions that do not comply with the Act. Under such circumstances, the Commission needs to make a factual determination of Bell Atlantic's actual practices and policies regarding resale and interconnection. It should be emphasized that RCN does not seek a hearing on theoretical or

^{8/} *Astroline* at 1561. In evaluating a request for an evidentiary hearing under Section 309(d)(1), "the Commission must proceed 'on the assumption that the specific facts set forth [in the petition] are true.'" *Id.*

^{9/} *Id.*

^{10/} *In re: ILEC Merger En Banc Hearing*, FCC Hearing Transcript, Testimony of James R. Young, Executive Vice President and General Counsel of Bell Atlantic, at 130 (lines 15-17) (December 14, 1998).

speculative matters. On the contrary, RCN proposes the development of a hearing record on past events – *i.e.*, Bell Atlantic's resale and interconnection practices and policies under Sections 251 and 252 of the Act. Such issues are eminently well suited for determination in an evidentiary proceeding. *See McCaw/AT&T*, 9 FCC Rcd 5836 at 5927-8 (1994), *affirmed*, *SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

C. Scope of the Proposed Evidentiary Hearing Requested by RCN

As indicated above, a factual dispute has arisen regarding the issue whether Bell Atlantic has complied with its obligations under Sections 251 and 252 of the Act, and RCN respectfully requests that the Commission hold an evidentiary hearing on this matter. Because the Commission did not allow initial commenters in this proceeding to respond to Bell Atlantic's and GTE's reply comments, contrary to the Commission's usual practice in adversarial matters, RCN and other CLECs have not had an opportunity to respond to the merger proponent's factual assertions in their reply comments. On the present record, it will be extremely difficult for the Commission to sort out the claims and come to a rational conclusion about the prior behavior of GTE and Bell Atlantic without resorting to a systematic fact-finding process. RCN recognizes that evidentiary hearings can be time-consuming. However, the delay can be minimized by the establishment of an accelerated hearing process, with resort to pre-filed testimony and pre-hearing discovery. The presiding officer can be directed to tailor specific scheduling to an overall time budget. RCN suggests that a meaningful hearing record can be developed in 90 days and a Recommended Decision can be required 30 or 45 days thereafter. Alternatively, the Commission can have the record certified directly to it without awaiting a decision from the presiding Administrative Law Judge.

Whatever specifics the Commission adopts, an accelerated schedule of three or four months does not seem unreasonable to develop a full record on the important question of the prior competitive behavior of the Applicants especially in the context of one of the largest telecommunications mergers in U.S. history. The creation of a full record with the parties' respective assertions subjected to discovery and cross examination would go far to provide a responsible basis for the Commission to address the issues presented by the proposed merger. On the other hand, given the importance of this merger to the national economy, and its size and prominence, it would be a serious abnegation of the Commission's statutory responsibilities to forego the opportunity to build a full record on the important matters of statutory compliance now before the Commission.

Alternatively, if the Commission does not chose to establish an administrative hearing procedure, it should at a bare minimum permit any interested party to respond to the Applicants' Reply Comments to the extent those Comments contain factual material not previously presented to the Commission. RCN believes that *Astroline* requires an evidentiary hearing on the disputed matters currently before the Commission. RCN would much prefer the opportunity to test GTE's and Bell Atlantic's Section 251 and 252 compliance claims in the crucible of a live hearing, but at a minimum should have the opportunity to respond on the record to any factual assertions made by GTE and Bell Atlantic for the first time in their Reply Comments.

III. Conclusion

WHEREFORE, RCN respectfully requests the Commission hold an evidentiary hearing to decide whether the proposed application of GTE for authority to merge into Bell Atlantic satisfies the "public interest, convenience, and necessity."

Respectfully submitted,

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February 26, 1999

Statement of Joseph O. Kahl

My name is Joseph O. Kahl. I am Director of Regulatory Affairs at RCN Telecom Services, Inc. ("RCN"). In that capacity I am familiar with the factual allegations set forth in RCN's previously filed Comments and Reply Comments in this proceeding and with RCN's efforts to secure facilities and services from Bell Atlantic under the Telecommunications Act of 1996.

As set forth in RCN's earlier submissions in this docket, Bell Atlantic has been unreasonably slow and generally uncooperative in a wide variety of CLEC/ILEC interactions. Although Bell Atlantic's spokesman at the En Banc hearing promised to respond to the factual allegations contained in the various CLECs' initial comments, Bell Atlantic's Reply Comments have not addressed each of RCN's contentions. In those instances where it has responded to a specific contention, the factual representations made to the Commission are either incomplete, unresponsive, erroneous, or all of the foregoing. Rather than provide a detailed refutation on each and every point, I confine myself here to one representative issue.

RCN alleged that Bell Atlantic delayed providing RCN access to poles and conduits in Massachusetts, New Jersey, New York, and Pennsylvania. Bell Atlantic's response at Reply Comments, Responses to Specific Allegations, p. 9, is so incomplete as to be totally useless. Bell Atlantic confines itself to addressing delays in Manhattan, observing that RCN's average delay of 112 calendar days is less than the average delay experienced by others and less than the average for Bell Atlantic itself. No data are provided to substantiate these claims. In fact, RCN's own data demonstrate that the average delay in New York City is not 112 days but 133 days, or some 19% more than claimed by Bell Atlantic. Bell Atlantic does not respond in any way to RCN's earlier allegation in its Comments¹ that in certain instances Bell Atlantic has rejected

¹RCN Comments at 6.

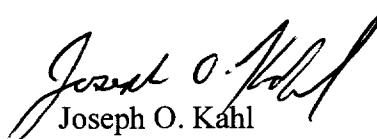
RCN's requests for access to Bell Atlantic's own existing conduit on the ground that available conduit space is being reserved for future use.

As to pole attachments, Bell Atlantic's "refutation" of RCN's claims, Responses to Specific Allegations, p. 9, is nothing more than a vague observation that Bell Atlantic has worked diligently to fulfill RCN's orders for pole attachments but does not have complete control of the process. I assert again that access to poles in Bell Atlantic territory has been too slow, in some instances amounting to more than 8 months.

In the one case where Bell Atlantic does address a specific instance -- access to electrical manholes serving its central offices in the Boston area, Bell Atlantic erroneously claims that delays in gaining access were caused by safety concerns; that Bell Atlantic worked extensively to find a reasonable way to accommodate RCN and that RCN withdrew its request when it became apparent that the local electric utility was unwilling to proceed due to safety concerns. Responses to Specific Allegations, p. 9. None of these contentions is true. Allowing RCN to route its fiber optic cable into Bell Atlantic central offices through electrical manholes of the Boston Edison Company would not create any danger of electrification or injury. As RCN advised Bell Atlantic, RCN personnel would perform all work inside the electrical manholes and electrical cable vaults. In any case there is no risk that the cable or any associated conduit would become energized. RCN uses dielectric fiber optic cable, which simply cannot conduct electricity, and plastic PVC pipe for conduit. Any cable racking that is used to support RCN cable inside the vault will never be extended outside of the electrical vault. All the foregoing facts were conveyed to, and known by, Bell Atlantic. Nor has RCN withdrawn its request, which has now been pending for more than 12 months.

I have reviewed the foregoing Petition for Evidentiary Hearing and hereby declare under penalty of perjury that the factual matters set forth therein and herein with respect to RCN's dealings with Bell Atlantic are true and correct to the best of my knowledge, information and belief.

February 25, 1999


Joseph O. Kahl

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 26th day of February 1999, I served a copy of the *Request for an Evidentiary Hearing by RCN Telecom Services, Inc. , CC Docket No. 98-184*, on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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